Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-1168

Frederick N. McDonald

Petitioner

v.

WILLIAM P. GERBERDING, President of the University of Washington; DR. BENJAMIN H. BELKNAP, Chairman of the Admissions Committee of the University of Washington School of Medicine; GORDON C. CULP, J. HANS LEHMANN, ROBERT D. LARABEE, R. MORT FRAYN, MRS. WILLIAM H. GATES, TAUL WATANABE, R. F. PHILIP, the Board of Regents of the University of Washington; University of Washington, Respondents.

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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## REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' statement of the case departs from the record in several important respects.

On page 5 respondents assert:

> "The admissions program did not treat applicants differently on the basis of race. Finding of Fact XVII, Petition, App. C at 26."

The finding reads, however:

> "Finding of Fact XVII. The School of Medicine gave no separate consideration nor separate treatment to Black American, Cicano, and American Indian applicants that were interviewed. The fact that the applicant was a member of a minority race was considered

by the Medical School." (Emphasis supplied.)

Although these favored minority applicants were not considered "separately," they were certainly considered "differently" by virture of their minority racial status.

The same paragraph of respondents' brief quotes Dr. Belknap's testimony that race was "considered to the extent that every individual's uniqueness is considered. V.R. 487." The implications of this rather benign statement, however, should not be overlooked. Respondents take the position that the color of an applicant's skin, per se, may be weighed as heavily in favor or against the applicant's ultimate admission as any non-racial factor such as medical aptitude, academic excellence, or extracurricular activities. This petition, however, raises the fundamental question of whether the respondents are entitled to treat a racial "uniqueness" to the same extent as any other "uniqueness." It is submitted that this is exactly what the Constitution forbids:

> "But racial discrimation is not just another competing consideration." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977).

Respondents' reference (page 5) to McDonald's 204th place ranking on the basis of his First Screen Score is also misleading. The First Screen Score



was computed for all applicants to the UW Medical School regardless of residence; however, nonresidents (other than favored minority students) were not seriously considered in the admissions process or even interviewed. Finding XI, Petition, App. C at 21. Excluding the nonresidents, petitioner's First Screen Score placed him well within that group of applicants who would have been offerred an acceptance if the First Screen Score were the only criteria. As a matter of fact, McDonald's First Screen Score was better than approximately half of the Washington residents who were actually admitted and was superior to all of the favored racial minorities actually admitted.

Reference to McDonald's relative placement on the Skeletal Consideration List (page 6) is similarly misleading. As noted in some detail in the original petition, the primary factor determining placement on this list is the applicant's inverview score. It is the interview which is employed as the racially discriminatory device and it is the interview which lacks governing principle in its application. Respondents seek to benefit from the very inadequacies which are called into question.

## ARGUMENT

### A. Fred McDonald, "but for" his particular race, would have been admitted to the UW Medical School.

The trial court specifically found (Finding XVII, Petition, App. C at 26) that "the fact that the applicant was a member of a minority race was considered by the medical school." It did not purport to make a finding that had Fred McDonald been a member of the favored minority race, his application would have been, in any event, denied. The record supports the opposite conclusion. If the words "but for" are meaningful in the Equal Protection context, they should be used with reference to the determining factor of the challenged classification - race, in this case. "What if" Fred McDonald was, for example, Black? McDonald's application should have been treated just as favorably.

> "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Bakke v. University of California Regents, 438 U.S. 265, 290 (1978).

Village of Arlington Heights, supra, is distinguishable from the case at bar. That action involved a Equal Protection challenge to a zoning ordinance limiting development to single family residences. The plaintiffs contended that the ordinance was racially discriminatory in effect since racial minorities were more likely to participate in the



use of high density dwellings. Racial considerations, unlike the case at bar, were not apparent from the face of the zoning ordinance and the relevant inquiry was relegated to a question of "motivation."

The case at bar, however, does not deal with the question of motivation, but with the fact of racial discrimination and its possible justification. In other words, we are not here concerned with establishing the "purpose:" we are dealing with whether or not the purpose is "impermissible." Arlington would appear to stand for the proposition exactly opposite respondents' contention: once an "impermissible purpose" has been established, the complainant is entitled to his remedy.

Respondents also urge (n. 1, p. 7, Resp. Brief) that relief is unavailable to the petitioner pursuant to 42 U.S.C. 2000d (1976) which requies that the petitioner establish his application was denied "on the ground of race." Respondents, however, have the burden to show petitioner's application would have also been denied had be been of a different race. The burden has not been met.

B. An arbitrary or capricious denial of the petitioner's application violates his property and/or liberty interests secured by the Due Process Clause of the 14th Amendment.

Respondents in effect urge that petitioners' Due Process rights are not violated even if he sucessfully establishes that his application was arbitrarily denied. Reliance is misplaced upon Board of Curators of the University of Missouri v. Horowitz 435 U.S. 78 (1978). The holding of the case, however, is otherwise. Horowitz concerned an already enrolled student who was dismissed for failure to meet academic standards. She questioned the dismissal procedure on Due Process grounds. This court ultimately held that if she was entitled to Due Process, she received it under the facts of the case. The Court specifically reserved:

> "We need not decide, however, whether respondents dismissal deprived her of a liberty interest in pursuing a medical career..." at 84.

> "Assuming the existence of a liberty or property interest, respondent has been awarded at least as much Due Process as the 14th amendment requires..." at 85.

Justice Marshall's concurring opinion sought to clarify that Horowitz was entitled to at least the procedural Due Process afforded. Marshall quoted approvingly from Judge Friendly:

> "As Judge Friendly has written in a related context, when the state seeks 'to deprive a person of a way of life to which (s)he has devoted years of preparation and on which (s)he has come to rely,' it should be required first to provide a 'high level of procedural protection.'" at 100.



The importance and impact of the denial of Fred McDonald's application cannot be overstated. Respondent has never previously questioned the applicability of the Due Process Clause to consideration of McDonald's application and the Washington State Supreme Court opinion is written based upon the understanding that the Due Process Clause is, in fact, applicable. Petition, App. A p. 443 et seq.

C. The Washington State Court Supreme decision is inconsistent with the decision of United States Supreme Court in Bakke.

Respondent contends that the U.W. program is consistent with the Bakke opinion written by Justice Powell. (p. 11):

> "Although race is considered in the program, there is 'no special consideration or separate treatment [of] Black American, Chicano, and American Indian applicants that were interviewed.' Finding XVII, Petition, App. C at 26 ..." (Emphasis added).

Respondent, however, misquotes Finding XVII which says the school of medicine gave no "separate" consideration rather than "special" consideration. The vice identified in justice Powell's opinion was not a matter of form but of substance - preferring one application over another because of race.

The last sentence in the same paragraph of respondents' brief is also inaccurate:

> "Thus the very aspect of the admissions program petitioner asserts to be constitutionally defective, the interview process, is characterized by individualized consideration of applicants without regard to race." Respondent brief 11.

The trial court found, however, just the contrary:

> "The fact that the applicant was a member of the minority race was considered by the medical school."

Petition, App. C at 26, Finding XVII

Respondent purports to justify the discriminatory admission process because it fosters "diversity" in the sense used by Justice Powell. The agreement found in the state supreme court opinion serves to frame the issue rather than resolve it. As to what is meant by "diversity" the Court's intention is directed to the testimony of Dr. Belknap quoted on page 5 of the petition.

Respectfully submitted,

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